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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
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FILE: [REDACTED]

Office: PHILADELPHIA, PA

Date:

JUN 11 2009

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom

Acting Chief, Administrative Appeals Office

DISCUSSION: The Acting District Director, Philadelphia, Pennsylvania, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed as the underlying waiver application is moot.

The applicant is a native and citizen of Mexico who was found inadmissible to the United States pursuant to section 1182(a)(2)(D)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(D)(i), for engaging in prostitution.¹ The applicant sought a waiver of inadmissibility under section 212(h) of the Act, which the district director denied, finding that the applicant failed to establish extreme hardship to a qualifying relative.

The AAO will first address the finding of inadmissibility.

Section 212(a)(2)(D)(i) of the Act renders inadmissible any alien who “is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status.” 8 U.S.C. § 1182(a)(2)(D)(i),

The record establishes that the applicant was convicted under Delaware statute of Patronizing a Prostitute, 11 Del. C. § 1343, on June 23, 1998. The law under which he was convicted states that a person is guilty of patronizing a prostitute when “the person pays a fee to another as compensation for that person’s having engaged in sexual conduct with the person . . .” or “[t]he person agrees to pay a fee to another person . . . in return for that person or a third person will engage in sexual conduct . . .” or “[t]he person solicits or requests another person to engage in sexual conduct with the person for a fee.” 11 Del. C. § 1343.

Although the Act does not define the term “prostitution,” the Board of Immigration Appeals (BIA) in *Matter of Oscar Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 553 (BIA 2008), and the Ninth Circuit in *Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006), stated that the Department of State provided a reasonable interpretation of the definition of the term “prostitution” for purposes of section 212(a)(2)(D), which is as follows:

The term “prostitution” means engaging in promiscuous sexual intercourse for hire. A finding that an alien has “engaged” in prostitution must be based on elements of continuity and regularity, indicating a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated acts.

22 C.F.R. § 40.24(b) (2006).

¹ The Acting District Director originally found the applicant inadmissible under § 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), for having been convicted of a crime involving moral turpitude (CIMT), but in response to a Motion to Reconsider by the applicant determined that the conviction was subject to the petty offense exception of § 212(a)(2)(A)(iii) of the Act. The Acting District Director then concluded that the applicant was inadmissible under § 212(a)(2)(D) of the Act for soliciting a prostitute.

In applying the definition of prostitution contained in 22 C.F.R. § 40.24(b), the phrase “engaging in prostitution,” within the meaning of section 212(a)(2)(D)(i) of the Act, requires something more than a casual or isolated act. Further, a plain reading of the phrase “procure” for the benefit of proceeds is distinguishable from the solicitation of services by a prostitute. There is no evidence that the intent of the section was to include persons convicted of receiving the services of a prostitute, as opposed to themselves acting as prostitutes or facilitating the prostitution of others as a matter of commercialized vice.

In *Matter of T-*, 6 I&N Dec. 474 (SIO 1954; BIA 1955), the BIA held that the term “engaged in prostitution” under former section 212(a)(12) means conduct carried on over a period of time and does not extend to a single act of prostitution. *Gonzalez-Zoquiapan* at 553.

Here, the record reflects that the applicant was convicted of one instance of patronizing a prostitute under Delaware law. Neither the Delaware statute nor the record of conviction establishes that the applicant was convicted of engaging in a regular pattern of prostitution as defined by 22 C.F.R. § 40.24(b). Therefore, the AAO finds that the district director erred in finding the applicant inadmissible under section 212(a)(2)(D)(i) of the Act.

Based on the record, the AAO finds that the applicant is not inadmissible under section 212(a)(2)(D)(ii) of the Act. The waiver filed pursuant to section 212(h) of the Act is therefore moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

ORDER: The appeal is dismissed as the underlying waiver application is moot.